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PETITIONERS' REPLY BRIEF.

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IN THE

Supreme Court of the United States

October Term, 1944.

No. 488.

NANNIE ELLYSON POLLARD, MARY ELLYSON DOWDY, HATTIE ELLYSON MADDOX, et al.,

Petitioners,

v.

CLAYTON HAWFIELD, FRANCES GERTRUDE SCOTT, FLORENCE O. METZ, MARY ELIZABETH HARVEY and AUBREY HARVEY,

Respondents.

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LUTHER ROBINSON MADDOX,
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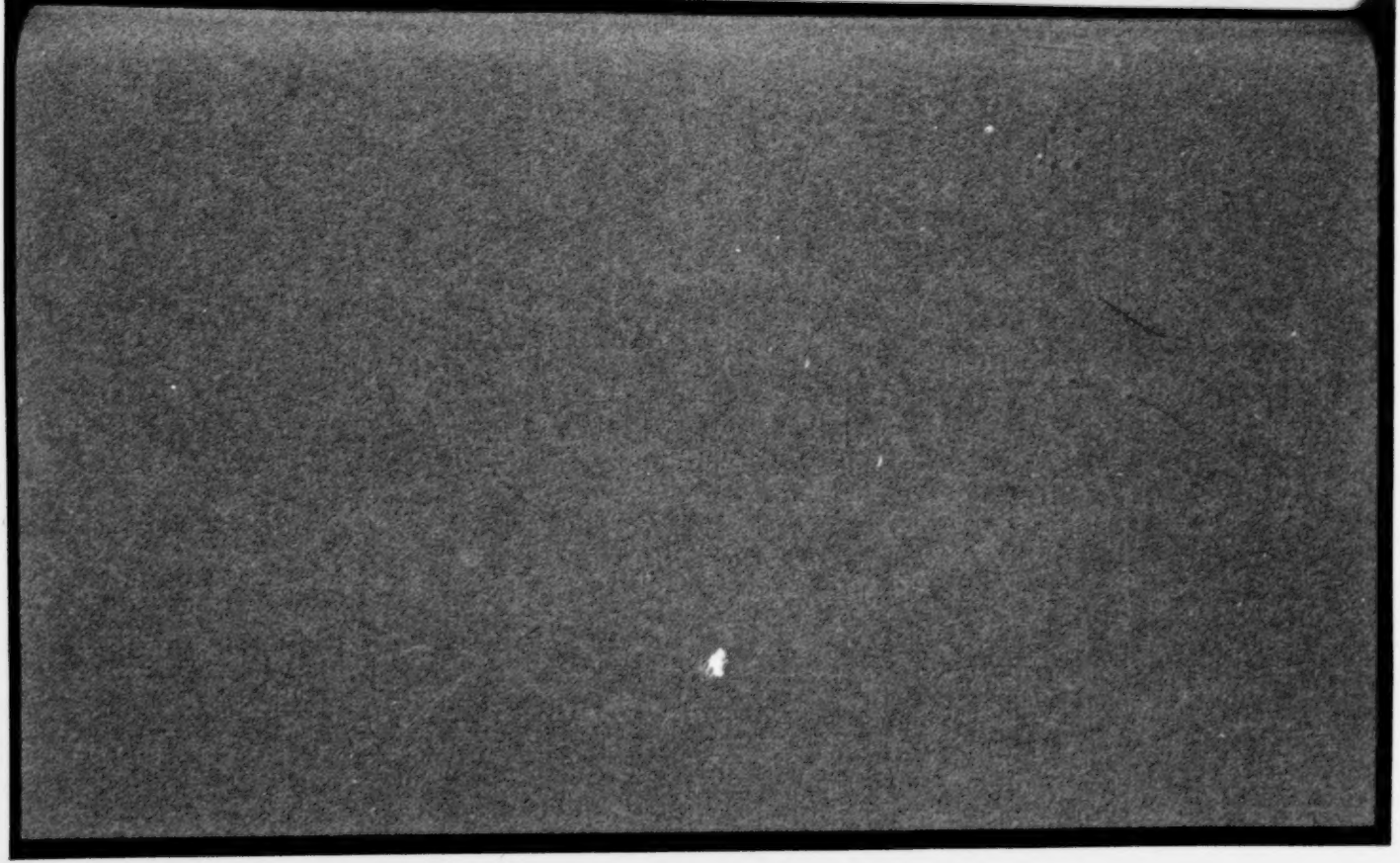
Of Counsel.



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Respondents devote the first two paragraphs of their brief, as they did in their brief to the Circuit Court, to showing the relative interests of Petitioners and Respondents in prior wills of the Testatrix. It is respectfully submitted that these are facts with which this Court could not be concerned; that whatever bearing they may have on the motives of the Petitioners in contesting the will, or the benefits that might or might not accrue to them if it were set aside, is beside the point; the sole question involved in this case being whether or not the contested will was that of the Testatrix, Mary Elizabeth Ellyson. It should be observed, however, that not only were three of the contestants men-

tioned in former wills eliminated from the contested paper, but the following relatives, consistently named in all the prior wills (or one or more of their parents while living), were also left out: Louise Price and Elizabeth Moore (daughters of deceased niece of Testatrix); William L. Browning, Bond J. Browning and Hilda Olson (children of deceased niece); Conway Owen, nephew of Testatrix.

Respondents' opposition brief is, almost verbatim, a second edition of the brief filed by them, as appellees, in the Circuit Court; with some minor changes necessitated by the change in courts and in the titles of the parties; some argument adapted from the Circuit Court's opinion; and the statement, on p. 5, that no question of general importance nor one of substance relating to the construction or application of the Constitution is presented to this Court, and that the Trial Court did not fail to give proper effect to any decision of this Court. Except for the statement last mentioned (which the facts do not support), there is no proper argument in Respondents' brief, Petitioners submit, against the granting of the writ.

The cases cited and quoted from in Respondents' brief are taken *in toto* from their Circuit Court brief. It was, and still is, the view of Petitioners that none of those cases are applicable to or support materially or substantially Respondents' position (as disclosed by the record in this Court), and that the great majority of them pointedly support Petitioners on various questions raised; and for this reason Petitioners did not reply to the almost identical brief filed by Respondents in the Circuit Court. Petitioners, therefore, would not now encroach upon the time of this Court with a reply brief, were it not that Respondents' brief contains certain outstanding misstatements of material facts.

Analysis of Respondents' Counter-Statement of Case.

On p. 2 of their brief Respondents (referring to R. 126) state that Fontaine Hall (the Trust Officer of the Testatrix's Bank, which supervised the drawing and execution of all the prior testamentary papers) was notified to see the Testatrix about the execution of a new will, but failed to do so. The testimony of Mrs. Metz referred to is that Mrs. Adams had told her that she (Mrs. Adams) had unsuccessfully tried to get Fontaine Hall to see the Testatrix about drawing a *power of attorney—not a will*—apparently for Mrs. Adams. The entire original record in this case was brought up and is now before this Court. And nowhere therein, or in the appendixes, will there be found evidence of any attempt to contact the Bank about the new will; although the record does show, as pointed out in the petition, that several opportunities were afforded the Respondents Mrs. Metz and Nurse Scott, and Mrs. Metz's attorney, to do so before the will was drafted.

Also on p. 2 of their brief, the statement of Nurse Edwards (R. 35) that *"at that time"* the Testatrix had pneumonia, is construed by Respondents to mean the time when, *some years before the date of the contested will*, the Testatrix suffered the cerebral hemorrhage which caused her paralysis; and this in the face of the further testimony of Nurse Edwards (Tr. 91, 92; R. 36) unequivocally stating that the Testatrix had the spell of pneumonia during the period in 1944 when the witness served as *special nurse for her*—from March 18th to about the end of April—and had not recovered from the attack when Nurse Edwards terminated her employment. The will is dated April 14, 1944.

In some four paragraphs appearing on pp. 2 and 3 of their brief, Respondents essay to show by the record that the attesting witnesses signed in the presence of the Testatrix

and thus complied with the mandatory requirement of the statute that they so sign. But neither in these paragraphs nor in the record does this fact definitely appear. The most that is indicated is that the attesting witnesses were "*in the room*" (perhaps the rear room of the connecting double parlors, in the front room of which, Mrs. Metz testified (R. 115, 140, 141), the Testatrix lay in her bed) and *saw the Testatrix sign*, and that they *afterwards signed in the presence of one another*. There is no evidence whatever that the Testatrix requested them to attest her will, or saw them sign it, or even was ever aware of their presence or knew that they had signed. Hence, the record does not show that due attestation of the will was proven.

On p. 4 of their brief, Respondents say the record (R. 118) indicates that Mabel Adams saw the Testatrix "*on numerous occasions*" after the execution of the will and was *refused admission only once*. Nothing in the record, either on p. 118 or elsewhere, substantiates this statement; Mrs. Adams' testimony (R. 40, 44, 182) seems to be that she saw the Testatrix only once after she was discharged.

On p. 4 also Respondents state that, "*contrary to the statement of counsel for the petitioners on page 5 of his brief*" the trial judge never expressed the opinion that a confidential relationship had been shown to have existed between the Testatrix and the Respondent Mrs. Metz. Respondents' statement is refuted, and Petitioners' supported, by the Court's words appearing on p. 572 of the transcript (reference to the latter p. having been inadvertently omitted from Petitioners' petition): "The Court: *Well, the confidential relationship most certainly is one existing between Mrs. Metz and the decedent immediately after the power of attorney was granted, if not before. It was granted on the 31st day of March and the will was executed on the 14th of April;* and most certainly there was a confidential relationship between the doctor and the nurse.

Unless that case has been changed". (Hagerty v. Olmstead, 39 App. D. C. 170) *"that is the law* • • •." And the record also shows (Tr. 571) that the Trial Judge also approved counsel's statement that a confidential relationship existed between the Testatrix and Mrs. Metz, *because the latter was managing the Testatrix's household and affairs under the power of attorney,* with the words: *"That makes it practically conclusive in my mind."*

On p. 5 Respondents say (referring to R. 175) that no exceptions were taken by either party to the Trial Judge's charge to the jury. This statement, too, is erroneous, as the record page shows. As the record also shows, no opportunity was afforded Petitioners to make objections out of the hearing of the jury; the exceptions taken by Petitioners were taken in the jury's presence. Petitioners' Prayers Nos. 2 and 7, as pointed out in the petition, had been previously discussed with the trial judge at the bench and denied. And one of Petitioners' principal points raised in their Petition is that the Circuit Court erred in holding that an exception was required to the Trial Judge's failure to cover in his charge the instructions therein prayed for; that, under Federal Civil Procedure Rule 46 no exception was necessary. The record page referred to indicates also that the Trial Judge thought no exception necessary to his direction of a verdict on the issue of fraud, because that, too, had been previously passed upon by him.

Analysis of Respondents' Argument.

In Par. 1 of Respondents' argument, beginning on p. 7 of their brief, in attempting to distinguish between the Hagerty case and the one at bar, they say that the chief beneficiaries in the contested will "were related to the testatrix" and "had nothing to do, according to the evidence • • • with the dictation of the terms of the will • • •." Yet, as pointed out in the petition, the record (R. 89, 90, 92) shows

that the beneficiary Mrs. Metz was heard to dictate certain provisions of the will over the telephone, and that she procured her own attorney to draw the will (R. 117, 119, 126). Respondents also seem to contend that no confidential relationship, in a legal sense, can exist between blood relatives.

Referring to Par. 2 of Respondents' argument (p. 12 *et seq.*): The Trial Judge, as the record shows, did not grant a motion for a directed verdict on the *issue of fraud* (p. 3) before Mrs. Metz had testified, but at the time announced his intention to direct it on the *issue of undue influence;* although he finally let the undue influence issue go to the jury and directed a verdict instead on the issue of fraud. Moreover, as shown in the petition, the testimony of Mrs. Metz referred to by Respondents was not the only substantial evidence of fraud. Before any motion for a directed verdict was made, there had been given Mrs. Pollard's testimony as to the telephone conversation (R. 89, 90, 92), above mentioned, and testimony of witnesses for the caveators and of Mrs. Adams indicating most strongly that the Testatrix had never directed or desired the latter's dismissal, *and never knew why she left.* The petition also points out other substantial evidence of fraud. The record discloses, too, that the facts in evidence comprise practically all the elements, only some of which, according to the majority rule in these United States, are required to raise *the presumptions* of fraud, undue influence and testamentary incapacity. *The uncontradicted facts are set out in the petition under the Statement of Matter Involved.*

Petitioners' counsel has carefully read and studied all the cases cited by Respondents, and has found it most difficult to follow Respondents' reasoning in connection with them. Since the issue of *undue influence* was submitted to the jury in the instant case (although not under proper instructions), cases on this issue are certainly not in point. How-

ever, the question of whether or not the facts raised *a presumption of undue influence,* and whether or not the Trial Judge erred in failing to so instruct the jury, is a main point in issue here. Petitioners, therefore, wish to present here *some additional cases showing the general majority rulings in will cases* and the rule in some of the various States on this presumption, in order that this Court may have a fair cross-section of the established law before it:

Alabama: *Little v. Sugg,* 243 Ala. 146 (1942).
Ziegler v. Coffin, 219 Ala. 586 (1929).

Florida: *Wartman v. Burleson,* 190 So. 789 (1939).

Missouri: *Heflin v. Fullington,* 37 S. W. 2d 931 (1931).

Nebraska: *In Re Kajewski's Est.,* 279 N. W. 185 (1938).

New Jersey: *In Re Nixon's Est.,* 41 A. 2d 119; 136 N. J. Eq. 242 (1945).

New York: *Tyler v. Gardiner,* 35 N. Y. 589 (1866).
In Re Wheeler's Will, 25 N. Y. S. 313 (1885).

Oregon: *In Re Brown's Est.,* 108 P. 2d 775 (1941).

So. Dakota: *In Re Rowland's Est.,* 18 N. W. 2d 290 (1945).

Virginia: *Barnes v. Bess,* 197 S. E. 403 (1938).
Culpepper v. Robie, 154 S. E. 687.

Washington: *In Re Jaaska's Est.,* 178 P. 2d 321 (1947).

Wisconsin: *In Re Stanley's Will,* 276 N. W. 353.

Also, the well-reasoned and pertinent case of *Lohre v. Starke* (Mo. Sup. Ct. 1932), 56 S. W. 2d 772, wherein the Court said: "*The presumption and fact or inference go hand in hand and really are the same thing. Hence the presumption, with its underlying facts or inferences, once be-*

ing in the case, never does or can disappear, but raises an issue for the jury.'' We submit that this means that when the facts in evidence raise the presumption of undue influence, the jury must be properly instructed concerning it and its effect on the weight of the evidence. This the Trial Judge, in the case at bar, did not do. Moreover, this rule should apply, also, to the Trial Judge's directing a verdict for Respondents on Issue No. 3 (Fraud).

The Boosalis case (Resp. Br. 24, 25) clearly supports Petitioners, both as to the direction of a verdict (on issue three—Fraud and Deceit) and the doctrine of *res inter alios acta*. In short, it is submitted, Respondents' brief is without foundation in fact and in law throughout.

Conclusion.

Petitioners submit, therefore, that Respondents in their opposing brief, have given no reasons, nor have they cited any applicable authorities to show, why this Court should not take jurisdiction and grant the petition for a writ of certiorari, review the case at bar, and settle the highly important questions raised, in the general interest of every litigant and lawyer who may be involved in the Federal Courts in a will case or any other case in which these questions may arise, and in order that justice may be accorded these Petitioners and a fair and impartial trial afforded them in accordance with established law. To this end, it is most respectfully urged that the petition for a writ of certiorari be granted and the case heard on its merits.

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NOTE:—*Italics supplied throughout.*